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in the
Supreme Court
of the
United States

October Term 1988

ROBERTO VALERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether a RICO enterprise alleged to consist of a group of persons associated in fact for the purpose of conducting illegal activity must have an ascertainable structure different from that inherent in the pattern of racketeering activity also required to establish a RICO offense, and whether the RICO enterprise alleged here -- a number of discrete drug smuggling ventures between 1977 and 1983 conducted by various groups of individuals -- possessed such an ascertainable structure?

2. Whether the government adequately proved the single RICO enterprise and the single RICO conspiracy charged where the evidence at trial established a number of discrete, self-contained drug smuggling ventures between 1977 and 1983 conducted by various groups of individuals; there was no evidence that petitioner participated in or was even aware of the majority of those ventures or that he knew a number of the persons involved in those ventures; and there was no basis for finding or inferring that the participation of others beyond the group involved in a particular venture was necessary for its success?

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Roberto Valera petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on May 20, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, affirming petitioner's conviction for violations of 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1952, is reported at 845 F.2d 923 (11th Cir. 1988).

JURISDICTION

The opinion of the Court of Appeals was issued on May 20, 1988 (A-1 to A-16). Judgment was entered on May 20, 1988 (A-17). A timely petition for rehearing was denied on August 30, 1988 (A-18 to A-19). This Court granted an enlargement of time to November 28, 1988 for filing this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. sections 1961 et seq. provide, in pertinent part:

18 U.S.C. § 1961(4):

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;"

18 U.S.C. § 1961(5):

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any

period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d):

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), (c) of this section.

STATEMENT OF THE CASE

On May 6, 1986 a multi-count indictment charging petitioner and seven others with, *inter alia*, conducting the affairs of an enterprise through a pattern of racketeering activity and conspiracy to do so (in violation of the RICO statute, 18 U.S.C. § 1962(c) and (d), was returned in the Middle District of Florida (A-20 to A-60). The enterprise was alleged to consist of "a group of individuals associated in fact, made up of the defendants and others, which engaged in and the activities of which affected interstate commerce." (A-23). The pattern of racketeering activity allegedly involved the importation, receiving, concealment, buying, selling and otherwise dealing in narcotic and dangerous drugs (A-23). Peti-

tioner was also charged with three counts of traveling in interstate or foreign commerce to facilitate the commission of a drug offense (A). After trial before a jury, petitioner was convicted of the RICO offenses and two of the three interstate travel offenses. He was found not guilty of the third.

The indictment alleged that the RICO offenses occurred between June 1979 and April 11, 1983 (A-22). While the indictment charged a single enterprise and a single conspiracy consisting of the eight named defendants and others and otherwise described 28 acts of alleged racketeering activity and 32 additional overt acts in furtherance of the conspiracy (A23 to A-50), there are no factual allegations in the indictment that petitioner had any contact with, or even knew of the existence of at least four of his named codefendants. Nor was there any evidence of such contact or knowledge at trial.[2]

The racketeering acts alleged in the indictment describe four marijuana transactions and a conspiracy to import cocaine in which petitioner was not alleged to be involved. Moreover, there was no evidence at trial that petitioner had any knowledge of these transactions or of two of the three named individuals who were allegedly involved in those ventures. The racketeering acts described in the indictment additionally includ-

[1]While the indictment charged eight persons with various offenses, petitioner was tried alone.

[2]Indeed, there was no evidence at trial that petitioner had any contact with or knowledge of a fifth named defendant who was allegedly involved with petitioner in a cocaine importation in March 1981. Rather, a governmental key witness testified that petitioner had nothing to do with that person. (Crawford 91).

ed four cocaine transactions in which there was likewise no allegation of any involvement on the part of Petitioner, but instead charged other groups of persons who similarly had no alleged connections to petitioner. Moreover, there was no evidence at trial that petitioner had any knowledge of these ventures or of persons allegedly involved therein. Finally, the racketeering acts described yet four more cocaine transactions in which no involvement on the part of petitioner was alleged. While these acts were committed by persons allegedly known to petitioner, there is no allegation that Petitioner knew or participated in such transactions, nor was any evidence of such knowledge or participation adduced at trial.

Despite the seeming countless acts and offenses committed by other individuals, Petitioner's alleged involvement was limited to a cocaine importation in March 1982; a hashish importation in October-November 1981 and causing travel to Belize and Gambia in October and December 1982 to facilitate drug transactions. These allegations involved three other named defendants.

The gravamen of the government's case at trial was presented through the testimony of three cooperating witnesses[3] who described a number of different drug smuggling ventures conducted by different groups operating at different times between 1977 and 1983. One of such witnesses—a pilot who participated in a number

[3]Two of those witnesses were charged in the same indictment and had previously pled guilty to various charges; the third had been charged in and pled guilty to a separate indictment.

of smuggling ventures—testified that there was no single group working on joint or continuing projects to smuggle drugs into the United States; rather, there were a number of unconnected groups each of which operated independently and were unaware of the others' existence (A-61 to A-64). Only one of the defendants named in the indictment was alleged to have been involved in all of the different groups.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. THE STANDARDS FOR DETERMINING THE NATURE AND SCOPE OF A RICO ENTERPRISE CONSISTING OF A GROUP OF INDIVIDUALS ASSOCIATED IN FACT SHOULD BE CLARIFIED BY THIS COURT TO RESOLVE A CONFLICT AMONG THE CIRCUITS

The court below found that "[w]hile there were many ventures or individual conspiracies, there was also one enterprise, one common purpose, and one overarching Conspiracy." (A-11). However, in so holding, the court failed to properly apply the essential elements of a RICO enterprise in its consideration of either the indictment or the evidence introduced at trial, viz.:

As noted, while the evidence demonstrated numerous drug smuggling ventures conducted by various and divers groups of individuals, it totally failed

to establish that these varied ventures[4] were part of a single enterprise within the meaning of the RICO statute or of a single, overarching RICO conspiracy. Indeed, key governmental testimony unequivocably demonstrated that there were a number of unconnected groups, unaware of each others' existence, which had independently committed the acts charged.

Albeit, in order to establish the substantive violation of the RICO statute as proscribed by 18 U.S.C. § 1962(c), the government must prove both the existence of an enterprise (defined in 18 U.S.C. § 1961(4)) and that a person employed by or associated with an enterprise conducted or participated in the conduct of the affairs of that enterprise through a pattern of racketeering activity (defined in 18 U.S.C. § 1961(5)).

In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that an enterprise could consist of a group of people, associated in fact, for the purpose of conducting illegal activity. As noted, the indictment in the case sub judice followed such pronouncement and charged that the indicted defendants and others allegedly constituted a single RICO enterprise consisting of a group of individuals associated in fact for the purpose of engaging in drug transactions.

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[4]The ventures involved the importation of marijuana from Colombia to Florida by plane; the importation of cocaine from Colombia to Florida by plane; the importation of cocaine from Colombia to North Carolina by plane; the importation of cocaine from Colombia to Georgia by plane; the importation of hashish from the Middle East to Delaware by boat; and conspiracy to import hashish from the Middle East, through Senegal and Belize to the United States by plane.

In *Turkette*, however, this Court at 583 also held that where an enterprise consists of such group of persons, they must also be "associated together for a common purpose of engaging in a course of conduct" and that such an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." Moreover, this Court further held that "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages."

While various Courts of Appeals have recognized these principles generally, the nature of the distinction between the enterprise and the pattern of racketeering activity and the proof necessary to establish that distinction has not been clearly defined. Whether a RICO enterprise must have an ascertainable structure distinct from that inherent in the pattern of racketeering activity, and how that structure is to be established, is an issue that has split the circuits. Compare, *United States v. Riccobene*, 709 F.2d 214, 223-24 (3rd Cir.), *cert. denied*, 464 U.S. 849 (1983); *United States v Bledsoe*, 674 F.2d 647, 665 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982); and United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985) (separate existence necessary); with *United States v. Bagaric*, 706 F.2d 42,55 (2nd Cir.) *cert. denied*, 464 U.S. 840 (1983); *United States v. Weinstein*, 762 F.2d 1522, 1537 n.13 (11th Cir.), *modified*, 778 F.2d 673 (1985), *cert. denied*, 475 U.S. 1110 (1986) (separate existence not necesary).

Petitioner submits that the requirement that an organization have a distinct ascertainable structure dif-

ferent from that inherent in the pattern of racketeering activity is essential to ensure that criminal enterprises are distinguished from individuals who associate for the commission of sporadic crime. As the Eighth Circuit Court of Appeal stated in *United States v. Bledsoe, supra*, 674 F.2d at 659, RICO "was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes." Yet, unless the government is required to establish an organization with a structure independent from that of the pattern of racketeering activity, it will be permitted, in practice and effect, to expand the parameters of the RICO statute far beyond its intended scope.

Although the Court in *Bledsoe, supra*, underscored the critical importance of establishing an ascertainable structure before a RICO conviction could lie, the Court below failed to provide even "lip service" to such sina qua non requirements.

Bledsoe, at 664:

> The word "enterprise" ordinarily means an undertaking or project or a unit of organization established to perform any such undertaking or project. However, under Rico, an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts. Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some degree of association

apart from the commission of the crime itself. *Thus unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, the Act simply punishes the commission of two of the specified crimes within a 10-year period. Congress clearly did not intend such an application of the Act.*

The *Bledsoe* court reasoned:

Because RICO does not require proof of a single agreement as in a conspiracy case, it creates a danger of guilt by association. *See United States v. Griffin*, 660 F.2d 996, 1000 14th Cir. 1981). The Individuality of guilt is assured by requiring proof that the enterprise with which individuals associated had certain distinct characteristics. As the Fourth Circuit wrote in *Griffin:*

> *Proof of the existence of an associated-in-fact enterprise requires proof of a "common purpose" animating its associates, and this may be done by evidence of an ongoing organization, formal or informal," of those associates in which they function as a 'continuing unit.' [Turkette,]* 452 U.S. at 538, 101 S.Ct. at 2528. The ties between the individual associates that are implied by these concepts *of continuity, unity, shared purpose* and *identifiable structure* operate precisely to guard against the danger that guilt will be adjudged solely by virtue of associations not so related. They define the

> line between "concerted action" through "group association for criminal purpose," for which "combination in crime" may constitutionally be proscribed, *Callanan v. United States*, 364 U.S. 587, 593-94 [81 S.Ct. 321, 325, 5 L.Ed.2d 312] (1961) and less clearly related conduct that may not be so proscribed and prosecuted. 660 F.2d at 1000. *Id.* at 664.

Clearly, the lower court failed to properly apply such principles or to otherwise adhere to the "fundamental" requirements enumerated by this Court in *Turkette* "that the enterprise function as a continuing unit" (at 665).

Here, and except for isolated, discrete and sporadic activities conducted by divers groups, the record demonstrates the total absence of any continuity of structure and personality as required in *Bledsoe*,

> What is essential, however, is that there is some continuity of both structure and personality. For example, the operatives in a prostitution ring may change through time, but the various roles which the old and new individuals perform remain the same. But if an entirely new set of people begin to operate the ring, it is not the same enterprise as it was before. *Id.* at 665.

Despite the compelling arguments and soundness of principles as enumerated in *Bledsoe* there is, notwithstanding, irreconcilable conflict and disparity of opinion presently existing between the circuits. Indeed, and as to the precise issues presented herein, the

positions of both the Fourth and Eighth Circuit Courts of Appeals appear to be in direct conflict with that enunciated by the Eleventh Circuit in the case sub judice.

Indeed, the gravity of the existing conflict is underscored in *U.S. v. Weinstein, supra*, where in a somewhat obscure footnote, the Eleventh Circuit vigorously denounced not only the pronouncements made by the *Bledsoe* court, but the *Turkette* holdings of this court as well, viz.

> The appellants in *Hewes* argued that the Eighth Circuit's holding in *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.) *cert. denled*, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982), (a RICO enterprise must possess an "ascertainable structure" distinct from the associations necessary to conduct the pattern of racketeering activity) stated a correct definition of RICO enterprise under federal law. *Our cases have repeatedly rejected this contention and we reiterate that rejection here.* Moreover, in *Hewes* we also rejected the contention that *Turkette's* reference to the RICO enterprise as a "continuing unit" required participation of all members throughout the life of the enterprise. This, too, is not the law of this circuit. *Hewes*, 729 F.2d at 1311.

Ergo, if as Petitioner contends, an ascertainable structure is, in fact, required to prove a RICO enterprise, this Court should appropriately establish and provide standards and guidance to the lower courts in defining the nature and scope of such requirement(s). Where the RICO enterprise is alleged to consist of different groups

of persons committing different offenses at different times, petitioner submits that factors such as the shared use of resources among groups, the sharing of profits among groups, the continuous maintenance of resources in readiness for the commission of offenses outside the time frame of actual offenses, and the existence of other activities undertaken by the alleged enterprise are elements which should necessarily be examined and scrutinized by the Courts.

In this case, however, the government failed to establish such a distinction between the enterprise and the pattern of racketeering activity. To the contrary, the evidence demonstrated that varying groups of people came together at various times for purposes of engaging in discrete drug transactions or groups of transactions. There was absolutely no showing of a "structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering . . ." *Id.*, at 664. For example, there was no evidence that the enterprise purchased assets jointly used by the different groups involved in the numerous drug transactions described or held in readiness for use during the intervals between the the commission of the various drug transactions. Nor was there evidence of profit sharing, common disbursements or expenditures, money laundering, etc. which was jointly used or shared in by the different groups.

Finally, the trial court's instructions failed to provide the jury with a proper standard for determining the existence of an enterprise. The trial court first provided the statutory definitions of enterprise and pattern of racketeering activity. The court then instructed that the jury had to find that "the defendant was associated with '*an* enterprise' as defined in these instructions dur-

ing the time of the alleged racketeering action as alleged in the indictment";[5] that the defendant committed two predicate offenses; that those predicate offenses were connected so as to be a pattern of criminal activity; that "through the commission of the two or more connected offenses, the defendant conducted or participated in the conduction of the enterprise affairs"; and that the enterprise was engaged in or that the activities affected interstate commerce (A-64 to A-65). Nowhere, was the jury instructed that proof of the enterprise required something more than mere association to commit the predicate acts.

Accordingly, petitioner submits that this Court should grant certiorari to resolve the split of authority in the Circuits and to provide the lower courts with needed guidance concerning the proper definition and nature of a RICO enterprise.

B. THE COURT BELOW ERRED IN FINDING A SINGLE RICO ENTERPRISE AND A SINGLE RICO CONSPIRACY UPON EVIDENCE OF DISPARATE, THOUGH SIMILAR, ACTIVITIES BY DISPARATE GROUPS; THIS COURT SHOULD REAFFIRM THE VITALITY OF KOTTEAKOS V. UNITED STATES AND REVERSE PETITIONER'S CONVICTIONS

[5]Thus, it is not even clear that the jury had to find the particular enterprise alleged in the indictment—as opposed to something else it may have determined met the overall statutory definition read by the trial court.

While the court below found that "there were many ventures or individual conspiracies," it also concluded, without appropriate basis in the record, that "there was also one enterprise, one common purpose, and one overarching conspiracy." (A-11). Petitioner submits that the lower court's conclusions in this regard are without support either in fact or in law. Rather, the evidence presented in this case demonstrates that the government failed to establish either the single RICO enterprise alleged in the indicment (if, indeed, it established any RICO enterprise at all) or the single RICO conspriacy alleged in the indictment, and that the failure to do so constitutes a material variance under *Kotteakos v. United States*, 328 U.S. 750 (1946) and its numerous progeny.[8] At best, the government's evidence established multiple enterprises and multiple conspiracies.

1. *Enterprise*

Proof of a single enterprise requires, at minimum, proof of a common or shared purpose, an ongoing organization and associates functioning as a continuing unit. *United States v. Turkette*, *supra*. Separate schemes, even though operated with the same modus operandi and sharing some overlap in participants do not establish a single enterprise. See, e.g., *United States v. Bledsoe*, *supra*.

[8]Indeed, in its closing argument the government sought to redefine the enterprise as a group of persons consisting simply of its three cooperating witnesses, rather than the defendants and others as charged in the indictment. Nor did the trial court correct this erroneous redefinition in its charge.

Petitioner concedes that there are a limited number of methods of importing controlled substances. Yet, evidence that different groups engage in such activities, even groups with some overlapping participants, cannot suffice to transform their multiple schemes into a single enterprise. Albeit, a number of separate schemes is all that the government established in the case at bar. Clearly, it proved no single hierachy or an inner circle directing a single, overarching organization in which different groups served different roles, such as financiers, importers, distributors, etc.—thereby rendering the particpation of a number of groups essential to the success of an overall operation. Rather, each smuggling group described by the witnesses was self contained; and had its own financial and operational personnel so that the participation of other groups was not necessary to the success of a particular operation. Nor was there evidence of a sharing of resources, facilities or profits among the disparate groups described at trial. Accordingly, the court below erred in finding a single RICO enterprise.

2. *Conspiracy*

A RICO conspriracy requires, at minimum, proof of an agreement to conduct or participate in the affairs of a RICO enterprise through a pattern of racketeering activity. *United States v. Neapolitan*, 791 F.2d 489, 498(7th Cir. 1986); *United States v. Sutherland*, 656 F.2d 1181, 1189 (5th Cir. 1981). Neither proof of an agreement to commit the predicate acts necessary to establish a pattern of racketeering activity, nor proof of association with an enterprise is sufficient to establish a single RICO conspiracy. Since it is the agreement to participate in the affairs of the enterprise charged that is the essence of a RICO conspiracy, to be held liable as a RICO

conspirator, a defendant must have understood the scope of the enterprise whose affairs he is charged with having agreed to further.

The fact that separate conspiracies may share a similar objective or a common conspirator does not transform those separate conspiracies into a single conspiracy. See, e.g., *United States v. Sutherland*, *supra*; *Kotteakos v. United States*, *supra*; *United States v. Cambindo Valencia*, 609 F.2d 603 (2nd Cir. 1979).

In this case, the government's evidence established, at most, separate conspiracies to engage in drug transactions. There was no evidence that petitioner participated or agreed to participate in any of the transactions conducted by other groups. There was no evidence that petitioner understood, or had reason to believe that any of his actions would render him a participant in the single enterprise conspiracy alleged in the indictment. Rather, as described by the government's witnesses at trial each of the many groups engaging in drug transactions were independent and self sufficient. Nor was there any reason for members of one smuggling operation to believe that a larger group was necessary for the success of their operation. This was not a situation in which one group was involved simply in importation and, therefore, reasonably had to know that additional personnel—financiers and distributors—would be required if their scheme was to succeed.

3. *Prejudicial Impact*

Here, as in *Kotteakos*, *supra*, the variances between the offenses alleged and the offenses proved affected peti-

tioner's substantive rights—his right "not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others." 328 U.S. at 775.[7] The "dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise..." (*id.*, at 774), cannot be ignored in this case, given the numbers of offenses by others presented at trial, the consequent prejudice is plain.

Accordingly, certiorari should be granted to correct the erroneous decision below; to define the proper scope of a RICO enterprise and a RICO conspiracy; and to otherwise reaffirm the principles of *Kotteakos v. United States*, 328 U.S. 750 (1956).

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[7]While petitioner was tried separately, the same principle applies All of the evidence of the alleged crimes committed by others was introduced against him since, as a matter of general conspiracy law, a conspirator is responsible for the acts of his conspirators.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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